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Wong Yee Boon v Gainvest Builders

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(W)-923-05 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND ZAMANI A RAHIM JJCA
11 APRIL 2017

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Contract — Illegality — Agreement — Introducer agreement — Use of influence and close connections to secure subcontract works — Claim for remuneration upon successful award of subcontract — Whether there was influence peddling to procure subcontract — Whether against public policy — Whether agreement legal, valid and enforceable — Contracts Act 1950 s 24

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The Government of Malaysia ('the government') identified a building project to be designed and completed ('the project') and Pembinaan BLT Sdn Bhd was identified to implement the project on behalf of the government and Mitsa Holdings Sdn Bhd was appointed as the main contractor with CRBC (M) Holdings Sdn Bhd ('CRBC') as the main subcontractor. The plaintiff informed the director of the defendant ('DW2') that he had a close connection with the CRBC and could secure subcontract works under the project for the defendant. Upon the successful award of the subcontract works to the defendant, the plaintiff would be paid a remuneration of RM4,276,027.10 ('the introducer fees') being the differential amount between the defendant's first quotation and the revised second quotation of the subcontract works submitted and accepted by CRBC. The plaintiff and the defendant executed an introducer agreement ('the agreement') and subsequently, CRBC awarded the subcontract to the defendant. However, the defendant informed the plaintiff that, inter alia, the management of CRBC claimed that they did not have any connection with the plaintiff. This prompted the defendant to terminate the agreement. The plaintiff submitted that he had performed its obligations to the defendant under the agreement and thus, in accordance with cl 6 of the agreement, the plaintiff was entitled to be paid the introducer fees. The High Court, in dismissing the plaintiff's claim, found the agreement to be illegal as it was contrary to public policy. Hence, the plaintiff appealed against the said decision. The issue that arose for determination was whether the agreement was valid under s 24(e) of the Contracts Act 1950 ('the Act').

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Held, dismissing the appeal with costs:

(1) The plaintiff's role to procure the award of the subcontract for defendant was borne out by cl 4(g) of the agreement which provides that among the

obligations of the plaintiff under the agreement was to 'assist in securing the award of the project to the subcontractor by the contractor'. Thus, since the primary object of the agreement was that the plaintiff would use his influence ('influence peddling') to procure the subcontract in respect of a public interest project, the agreement was thus void as being in contravention of public policy (see paras 52 & 54).

(2) The project was a government project. All subcontract works would be funded, indirectly through the main contractor(s) by public funds. The marking up of the quotation for the subcontract works would necessarily mean artificially inflating the costs of the project. This would in effect compromise the quality of the end projects to be delivered to the government. The costs of maintenance of poor quality deliverables would invariably be high, thus causing a further drain of public funds. The blatant marking up of the price of the items in the revised quotations solely for the purpose of providing for the plaintiff's exorbitant 'introducer fees' to secure the subcontract for the defendant was outrageous as it was tantamount to reaping unreasonable and unlawful profits from public funds. In addition, illustration (j) of s 24 of the Act also describes an agreement for payment of money in order to exercise an influence as being immoral (see paras 56–57 & 59).

(3) The agreement between the plaintiff and the defendant contravened both public policy and morality, pursuant to s 24(e) of the Act. It mattered not whether the commercial transaction under curial scrutiny involves a government contract or otherwise. It must pass the test of having to clear the injuncts, as provided by s 24 of the Act. The court shall not lend its aid to parties in an illegal contract by way of enforcing such a contract. The introducer agreement was therefore void ab initio and accordingly, there was no question of the plaintiff's purported entitlement under the agreement (see paras 60 & 62–64).

[Bahasa Malaysia summary

Kerajaan Malaysia ('kerajaan') telah mengenal pasti satu projek pembangunan untuk direka dan disiapkan ('projek tersebut') dan Pembinaan BLT Sdn Bhd dikenal pasti sebagai pelaksana projek bagi pihak kerajaan manakala Mitsa Holdings Sdn Bhd dilantik sebagai kontraktor utama dan CRBC (Malaysia) Holdings Sdn Bhd ('CRBC') sebagai subkontraktor utama. Plaintif memaklumkan pengarah defendan ('DW2') bahawa dia mempunyai hubungan rapat dengan CRBC dan boleh menjamin kerja-kerja subkontrak projek tersebut untuk defendan. Apabila award subkontrak berjaya diberi kepada defendan, plaintif akan dibayar ganjaran RM4,276,027.10 ('bayaran pengantar') sebagai jumlah perbezaan antara sebut harga pertama defendan dan sebut harga kedua disemak semula kerja-kerja subkontrak yang diterima oleh CRBC. Plaintif dan defendan melaksanakan satu perjanjian pengantar ('perjanjian') dan seterusnya, CRBC mengawardkan subkontrak kepada

defendan. Walau bagaimanapun, defendan memaklumkan plaintif bahawa CRBC mendakwa mereka tidak mempunyai apa-apa kaitan dengan plaintif. Ini menyebabkan defendan membatalkan perjanjian. Plaintif menghujahkan dia telah menjalankan kewajipannya kepada defendan bawah perjanjian dan oleh itu, menurut klausa 6 perjanjian, plaintif berhak dibayar bayaran pengantar. Menolak tuntutan plaintif, Mahkamah Tinggi memutuskan perjanjian tersebut tidak sah kerana bertentangan dengan polisi awam. Dengan itu, plaintif merayu terhadap keputusan tersebut. Isu yang timbul bagi pemutusan mahkamah adalah sama ada perjanjian antara plaintif dan defendan sah menurut s 24(e) Akta Kontrak 1950 ('Akta).

Diputuskan, menolak rayuan dengan kos:

(1) Peranan plaintif untuk mendapatkan award subkontrak untuk defendan juga ditanggung oleh klausa 4(g) perjanjian yang memperuntukkan bahawa antara kewajipan plaintif bawah perjanjian adalah 'membantu mendapatkan award projek buat subkontraktor oleh kontraktor'. Dengan itu, oleh kerana objektif utama perjanjian ini adalah supaya plaintif menggunakan pengaruhnya ('pengaruh menjaja') untuk mendapatkan subkontrak berkenaan projek yang mempunyai kepentingan awam, perjanjian adalah tidak sah kerana bertentangan dengan polisi awam (lihat perenggan 52 & 54).

(2) Projek ini projek kerajaan. Semua kerja-kerja subkontrak akan dibiaya secara tidak langsung melalui kontraktor utama oleh dana awam. Penandaan naik sebut harga kerja-kerja subkontrak bermakna kos projek dinaikkan. Ini mengkompromi kualiti projek akhir yang diserahkan kepada kerajaan. Kos penyelenggaraan penyampaian kualiti rendah akan sentiasa tinggi, oleh itu menyebabkan dana awam berkurangan. Dengan menaikkan harga item-item secara terang-terangan dalam sebutan harga yang disemak semula hanya untuk tujuan membekalkan 'bayaran pengantara' bagi memperolehi subkontrak untuk defendan adalah tidak masuk akal kerana ia menyebabkan pengambilan keuntungan yang tidak munasabah dan menyalahi undang-undang daripada dana awam. Tambahan, ilustrasi (j) s 24 Akta juga menghuraikan bahawa satu perjanjian untuk bayaran bagi melaksanakan pengaruh adalah tidak bermoral (lihat perenggan 56–57 & 59).

(3) Perjanjian antara plaintif dan defendan melanggar polisi awam dan moral menurut s 24(e) Akta Kontrak. Tidak penting sama ada ini adalah transaksi komersial bawah penelitian curial yang melibatkan kontrak kerajaan atau sebaliknya. Ia harus lulus ujian menyingkirkan injunksi, seperti yang diperuntukkan oleh s 24 Akta Kontrak. Mahkamah tidak perlu membantu pihak-pihak yang terlibat dalam kontrak tidak sah dengan menguatkuasakan kontrak tersebut. Perjanjian pengantara dengan itu adalah tak sah ab initio dan tidak timbul persoalan sama ada

A plaintif mempunyai hak bawah perjanjian itu (lihat perenggan 60 & 62–64).]

Notes

B For cases on agreement, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 5651–5656.

Cases referred to

Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281, SC (refd)
C *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)

Legislation referred to

Contracts Act 1950 s 24, 24(e)

D

Appeal from: Civil Suit No S-22–342 of 2009 (High Court, Kuala Lumpr)

Sunil Abraham (Ellaine Alexander with him) (Cecil Abraham & Partners) for the appellant.
E *Ben KF Lee (Shafiehani bt Md Ali with her) (Gan & Zul) for the respondent.*

Badariah Sahamid JCA (delivering judgment of the court):

INTRODUCTION

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[1] This is an appeal against the decision of the learned High Court judge on 8 April 2016, who after full trial dismissed the plaintiff's claim against the defendant with costs. The plaintiff's claim is premised on an introducer agreement between the plaintiff and the defendant dated 19 November 2006.

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[2] For convenience, parties will be referred to as they were in proceedings before the High Court, namely the appellant as the plaintiff and the respondent as the defendant.

H BACKGROUND FACTS

[3] The Government of Malaysia identified a project to be designed and completed, known as, 'Cadangan Pembangunan Bangunan Tambahan Bagi Ibu Pejabat Polis Kontinjen, Kuala Lumpur (IPP-KL) serta Komponennya
I diatas Lot PT 112, Seksyen 56, Mukim Bandar Kuala Lumpur' ('the project').

[4] Pembinaan BLT Sdn Bhd was identified to implement the project on behalf of the Government of Malaysia. Mitsa Holdings Sdn Bhd was appointed as the main contractor with Generasi Tangkas Sdn Bhd ('Generasi Tangkas') as the initial man subcontractor.

[5] Generasi Tangkas was later substituted with CRBC (M) Holdings Sdn Bhd ('CRBC').

[6] The plaintiff had informed Mr New Chee Peng ('DW2') the director of the defendant, that he had a close connection with the top management of CRBC and could secure subcontract works under the project for the defendant.

[7] Upon the successful award of the subcontract works to the defendant, the plaintiff would be paid a remuneration of RM4,276,027.10, being the differential amount between the defendant's first quotation and the revised second quotation of the subcontract works submitted and accepted by CRBC.

THE INTRODUCER AGREEMENT

[8] On 19 November 2006, the plaintiff and the defendant had executed an introducer agreement ('the agreement').

[9] The material terms of the agreement are set out below:

> Clause 2: Award of Project to the Sub-Contractor
>
> The Sub-Contractor is awarded the project by CRBC (hereinafter called 'Contractor').
>
> Clause 3: Obligations of the Sub-Contractor
>
> a. The Sub-Contractor shall submit two (2) quotations with regards to the project as follows:
>
> i. The first quotation shall be submitted to the Introducer. A copy of the said first quotation shall be submitted to the Introducer and agreed by both Parties for validity and counter-signed by both parties and attached to this Agreement at a later date from the date of this Agreement.
>
> ii. Thereafter, the Introducer shall revise the project sum in the first quotation and thereafter the quotation as revised by the Introducer shall be submitted by the Sub-Contractor to the Contractor for the Contractor's approval (hereinafter called 'the second quotation'). A copy of the second quotation shall be submitted to the Introducer and agreed by both Parties for validity and counter-signed by both parties and attached to this Agreement at a later date from the date of this Agreement.

A b. The Sub-Contractor shall pay to the Introducer the consideration as stipulated in Clause 4 of this Agreement in accordance with the agreed payment terms as defined in clause 5 of this Agreement.

Clause 4: Obligations of the Introducer

B a. Advise, negotiate and facilitate with information to the Sub-Contractor with regards to the revision of the first quotation as defined in Clause 3(a)(i).

b. Compile all relevant documentation required for the Sub-Contractor to submit the second quotation as defined in Clause 3(a)(ii) of this C Agreement.

c. Assist, liaise and work closely with the Sub-Contractor in matters that leads to obtaining the tender of the project from the Contractor.

d. Assist in securing the award of the project to the Sub-Contractor by the D Contractor.

Clause 5: Condition

The validity of this Agreement shall be dependent on the award of the project to the Sub-Contractor by the Contractor.

E Clause 6: Consideration

Subject to Clause 7 below, in consideration of the Introducer's initiatives, the Sub-Contractor shall pay to the Introducer the sum that is the difference between the first and the second quotation. The computation of this difference is as follows:

Second Quotation	RM 35,369,505.25
F (less) First Quotation	(RM 31,093.478.15)
TOTAL CONSIDERATION	RM 4,276,027.10

Clause 7: Payment terms

G a. The consideration as described in Clause 6 shall be payable progressively to the Introducer by the Sub-Contractor. All invoices paid on to the Sub-Contractor by the Contractor shall be subject to necessary deductions payable to the Introducer. For the avoidance of doubt, the said deductions shall mean the corresponding difference(s) between the second quotations as per Clause 6 above.

H b. Payment must be remitted to the Introducer no later than three (3) days after the Sub-Contractor is in receipt of payment from the Contract.

c. In the event where there is an increase or decrease that shall affect the total Consideration sum due to the Introducer by virtue of Clause 6 above, the difference shall be either added on or deducted in accordance with clause I 6 above and progressively as described in clause 7a above.

Clause 8: Default of Payment

a. In the event of default on any instalment payment as per clause 7 above, the Introducer shall have a right to demand the total outstanding balance due to the Introducer by the Sub-Contractor.

b. For the avoidance of doubt, the 'total outstanding balance' shall mean the full consideration as per Clause 6 of this Agreement less any sums that have been already paid to the Introducer by the Sub-Contractor in accordance with Clause 7 of this Agreement.

c. Any part of full default on the instalment payments as described in this Clause herein shall be subject to an interest rate of ten per cent (10%) per annum pro-rated on all outstanding balance sums due.

Clause 13: Entire Agreement

This Agreement contains the full and complete understanding between the Parties and supersedes all prior arrangements, agreement and understanding, whether written or oral pertaining to the subject matter of this Agreement and may not be varied except by an instrument in writing signed by all of the Parties.

[10] Subsequently, by a letter dated 4 December 2008, CRBC issued a 'letter of intent' to the defendant, appointing the defendant as subcontractor for the subcontract sum of RM61m.

[11] However, by a subsequent letter dated 11 December 2008, CRBC rejected the defendant's quotation of RM35,369,505.25 and cancelled the earlier letter of intent dated 4 December 2008.

[12] By a letter dated 22 December 2008 the defendant submitted to CRBC a quotation of RM51,688,965.25.

[13] On 9 January 2009, CRBC awarded the subcontract to the defendant.

[14] By a letter dated 12 January 2009, the defendant wrote a letter to the plaintiff stating, inter alia, that the management of CRBC had claimed that they did not have any connection with the plaintiff whatsoever. Accordingly, the defendant terminated the agreement.

THE PLAINTIFF'S CLAIM

[15] The plaintiff's claim may be summarised as follows.

[16] In a letter dated 19 November 2008, the defendant had appointed the plaintiff as introducer to the project. The parties also executed an introducer agreement wherein it was agreed that the plaintiff will carry out his obligations to assist the defendant in securing the project from CRBC. The material terms of the agreement have been reproduced above.

[17] Among the obligations of the plaintiff was to revise the quotation attached in the letter and submit the revised quotation to the defendant. As

consideration for the plaintiff's services, the plaintiff would be paid the differential amount between the first quotation and the revised second quotation.

[18] The defendant had been awarded the subcontract by CRBC. The plaintiff had performed its obligations to the defendant under the agreement. Thus, in accordance with cl 6 of the agreement the plaintiff was entitled to be paid the 'Introducer fees' of RM4,276,027.10.

THE DEFENCE

[19] The defendant's defence may be summarised as follows.

[20] At all material times, the plaintiff had represented to the defendant, inter alia, that the plaintiff had a close connection and a special relationship with all the directors of CRBC, which had enabled the plaintiff to be awarded the subcontract works under the project, even though the quotation from the defendant for the subcontract sum was high.

[21] The plaintiff had represented to the defendant that the plaintiff could obtain an award of a higher subcontract sum from CRBC by the revision of the first quotation of the subcontract works submitted to CRBC to a higher amount. The first quotation sum was RM31,093,478.15.

[22] However, by a letter dated 11 August 2008, CRBC had rejected the revised second quotation of subcontract sum of RM35,369,505.25, submitted by the plaintiff on behalf of the defendant.

[23] The plaintiff had no such relationship with CRBC, to enable the plaintiff to secure the award of the subcontract works to the defendant. Hence, the defendant had lawfully terminated the agreement with the plaintiff on 12 January 2009.

[24] CRBC had by letter dated 9 January 2009 awarded to the defendant subcontract works under the project for the provisional sum of RM58,600,000 which represented the whole subcontract works and not just the structural works as was stated in the second revised quotation referred to in the agreement.

ISSUES BEFORE THE HIGH COURT

[25] The central issue before the High Court was whether the agreement between the plaintiff and the defendant was illegal for being in contravention of s 24(e) of the Contracts Act 1950?

Section 24(e) provides:

> The consideration or object of an agreement is lawful, unless the court regards it as immoral, or opposed to public policy.

[26] Another issue was whether the plaintiff was entitled to be paid under the agreement?

FINDINGS AND DECISION OF THE HIGH COURT

[27] The learned trial judge found the agreement to be illegal as it was contrary to public policy and dismissed the plaintiff's claim. At p 20 of her judgment, Her Ladyship states:

> I agree with the submissions by counsel for the defendant that the IPPKL project is a government project, therefore the IPPKL project is meant for public welfare and interest. Therefore, the plaintiff's conduct of influencing and executing the marking up of the contract price will consequently increase the government's burden and spending, further the same would tantamount to reaping unreasonable profit from the public fund whereby:
>
> (a) the marking up of the contract price is tantamount to misusing and/or making irresponsible and unlawful personal profits from the country's taxpayers and also the public funds;
>
> (b) the same is not just a mere misconduct, but it is also very harmful to the development of the construction work it would substantially contribute to the unjustified rise to the public infrastructure costs; and
>
> (c) Furthermore, the conduct of marking up in the said contract price will also encourage more procurement of public construction contract by way of influencing the contract price and the same shall affect the public interest as a whole.

[28] In holding the agreement to be illegal, the learned trial judge had relied on the Federal Court case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212, where the Federal Court ruled that a contract procured on influence is against public policy. In Her Ladyship's opinion, the instant case, 'fall squarely on all fours with *Merong Mahawangsa* case'.

[29] The learned trial judge also ruled that the plaintiff had not proven that he was entitled to the claim, inter alia, on the following grounds:

> As regards the mode of payment, the provision is ambiguous. It is difficult to actually interpret cl 7 of the introducer agreement. So even if this court find that he had done his part under the introducer agreement, because finally what was given as sub contract price was different from the second quotation how do you calculate payment. It is very ambiguous.

A GROUNDS OF APPEAL

[30] In his written submissions (at p 17), the plaintiff has summarised the primary issues of his appeal as follows:

B (a) whether the agreement was contrary to public policy and/or illegal?

(b) whether the plaintiff had made representations that caused the defendant to execute the agreement?

(c) whether the plaintiff had fulfilled his obligations pursuant to the terms C and conditions of the agreement?

(d) whether the defendant has breached its obligations under the agreement?

(e) whether the termination of the agreement by the defendant by its letter D of 12 January 2009 is lawful? and

(f) whether the plaintiff is entitled to be paid his remuneration pursuant to cl 6 and/or 7 of the agreement?

E OUR JUDGMENT

Issue of illegality

[31] We note that the threshold issue in this appeal is whether the agreement F between the plaintiff and defendant is illegal pursuant to s 24(e) of the Contracts Act 1950?

[32] Should we decide on the threshold issue in the affirmative, the effect would be that the agreement is null and void ab initio and thus there would not G arise the other issues on appeal stated above, as a contract which is void for illegality confers no rights or obligations on the parties thereto.

[33] However, if we determine the agreement to be valid, we would then consider whether the plaintiff has fulfilled his obligations under the agreement H to entitle remuneration under the agreement.

[34] The learned trial judge had found the agreement to be illegal on the premise that there was 'influence peddling' by the plaintiff and as the project I was in respect of public works, the contract was contrary to public policy. Consequentially, the agreement was void. On that premise, there would have been no necessity for the learned judge to make the finding that the plaintiff was not entitled to the remuneration under the agreement as the terms in respect of payment was 'ambiguous'.

[35] Before us, learned counsel for the plaintiff had submitted that the learned trial judge had erred in fact and law. The following grounds were canvassed before us.

[36] The learned trial judge had erred in relying primarily on the Federal Court case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212 ('Merong Mahawangsa') as the abovenamed case can be distinguished from the instant case.

[37] In *Merong Mahawangsa*, the question before the Federal Court was as follows:

> Whether an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under s 24(e) of the Contracts Act 1950 *and is therefore void?*

[38] The material facts of *Merong Mahawangsa* may be summarised as follows. Pursuant to a letter of undertaking, the respondent claimed a sum of RM20m, being the payment agreed upon by the appellants for services rendered by the respondent in procuring for the appellants the award of the Johore-Singapore bridge project ('the SIG project'). The respondent claimed that he had used his influence and good relationship with the Government of Malaysia to procure the bridge project for the benefit and interest of the first appellant. In his amended statement of claim, the respondent particularised his close relationship with named Federal Ministers and his dealings with Federal Ministers with respect to the bridge project. Accordingly, the Federal Court had found that:

> An agreement, the object of which is to use the influence with ministers of government to obtain a favourable decision, is destructive of sound and good administration. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on its own merits. Such an agreement is contrary to public policy.

[39] Learned counsel for the plaintiff had distinguished the facts of *Merong Mahawangsa* from the case before us. In the instant case, the project was already awarded to Pembinaan BLT Sdn Bhd, who awarded the main contract to Mitsa Holdings Sdn Bhd with Generasi Tangkas Sdn Bhd ('Generasi Tangkas') Generasi Tangkas was later substituted with CRBC (M) Holdings Sdn Bhd ('CRBC').

[40] It was further contended that the dealings between the parties in this case were between the contractors and subcontractors of the project and not between the Government of Malaysia as the award giver and Merong Mahawangsa as the company attempting to acquire the SIG project.

[41] Consequentially, it was contended that the mark-up of the subcontract price is a matter between the main subcontractor and contractor, and thus the taxpayer's monies do not form the consideration of payments between the subcontractors.

[42] In addition, learned counsel for the plaintiff had submitted that the obligations under the letter of undertaking in *Merong Mahawangsa* was to procure and secure from the Government of Malaysia, the award of the SIG project through the influence of the defendant. Thus, there was cogent evidence of 'influence peddling'. In the instant case, the plaintiff's role is that of a consultant and assistant to the defendant in its submission of quotations to CRBC.

[43] To substantiate the above contention, learned counsel for the plaintiff had referred us to the relevant terms in the agreement. Clause 4 of the introducer agreement provides the following obligations of the plaintiff:

> d. *Advise, negotiate and facilitate* with information to the Sub-Contractor with regards to the revision of the first quotation as defined in Clause 3(a)(i).
>
> e. *Compile all relevant documentation* required for the Sub-Contractor to submit the second quotation as defined in Clause 3(a)(ii) of this Agreement.
>
> f. *Assist, liaise and work closely with the Sub-Contractor* in matters that leads to obtaining the tender of the Project from the Contractor.
>
> g. *Assist in securing the award* of the Project to the Sub-Contractor by the Contractor. (Emphasis added.)

[44] The argument of learned counsel for the plaintiff was that the contractual obligations under the agreement was not to procure and secure the award of the contract, but to assist the defendant in the submissions of the quotations. This was evidenced, inter alia, by the various communications with the defendants as well as the various revisions to the quotations performed by the plaintiff at the defendant's request.

[45] Thus, the plaintiff submitted that the object of the agreement is not illegal for being contrary to public policy pursuant to s 24(e) of the Contracts Act.

[46] We are mindful of the principle that courts should, as much as possible uphold commercial bargains between parties unless the circumstances are such that justify striking them down. In examining the agreement between the plaintiff and the defendant, what is material is not the labels attached to the agreement, but the pith and substance of the commercial bargain between the plaintiff and the defendant.

[47] We have carefully examined the Federal Court decision of *Merong Mahawangsa*. To a certain extent, we disagree with the learned trial judge's conclusion that the instant case 'fall squarely on all fours with *Merong Mahawangsa*'. In that case, the evidence on influence peddling to procure the award of the government project, was, as submitted by learned counsel for the plaintiff, supported by substantial and cogent evidence, including the admissions by the relevant parties.

[48] Nevertheless, the question we ask ourselves is this: From the facts of the instant case, is there sufficient evidence of influence peddling by the plaintiff to bring it within the principle in *Merong Mahawangsa*?

[49] One of the arguments raised by the plaintiff was the denial that the plaintiff was in a position of influence to secure the award of the subcontract. This was evidenced by the contents of the letter dated 12 January 2009 issued by the defendant to the plaintiff to terminate the agreement. The relevant part of the letter reads as follows:

> Date 12th January 2009
>
> RE: APPOINTMENT AS INTRODUCER TO PROJECT
>
> CADANGAN PEMBANGUNAN TAMBAHAN BAGI IBU PEJABAT POLIS KONTINGEN KUALA LUMPUR (IPKKL) SERTA KOMPONENNYA DI ATAS LOT PT 112, SEKSYEN 56, MUKIM BANDARAYA KUALA LUMPUR
>
> Our earlier letter ref. no. GBMSM/WYB/07/GEN/06 dated 19th November 2009 regarding the above matter is refers.
>
> However, we have discussed the matter with the management of CRBC (Malaysia) Holdings Sdn Bhd and they claimed that they have no connection with you whatsoever. In the circumstances, there is no way you can assist us in getting the project. Your claim, that you have connection with CRBC (Malaysia) Holdings Sdn Bhd is totally untrue. As such we have no alternative but to terminate the agreement and save all the parties from embarrassment.
>
> Thank you, Yours faithfully,
>
> GAINVEST BUILDERS (M) SDN BHD
>
> .....
>
> New Chee Pheng
>
> (Director)

[50] To counter the above argument, the defendant's contention is that the learned trial judge had made a finding of fact that there was evidence of influence peddling by the plaintiff, and such finding was supported by the following evidence. The plaintiff's witness statement (Q9) states as follows:

A Q: How did you know about the Project and become involved in it?

A: On or about 25.1.2007, I was approached by Mr. Hu Bin who was a Director of CRBC. CRBC is a general contractor company which undertakes a full range of buildings and civil engineering works throughout Malaysia.

B Mr. Hu Bin was also a Director of a company called Generasi Tangkas Sdn Bhd. ('Generasi Tangkas')

Mr. Hu Bin introduced me to one Mr. Ling Sing Hock ('Felix Ling'), who was also a Director in Generasi Tangkas and En. Mohd. Johari Mat Aris ('Mohd. Johari') who is the CEO OF Mitisa Holdings Sdn Bhd. ('Mitisa')

C

Based on my discussions with Hu Bin, Mohd. Johari and Felix Ling, I found out that the Government of Malaysia wanted to start on a project to build an extension to the existing Kuala Lumpur Police Contingent Building. The project was owned by Pembinaan BLT Sdn which is a company that is wholly owned by the Ministry of Finance of Malaysia.

D

After being appointed as the main subcontractor of the project, CRBC wanted to further subcontract the structural construction works in relation to the project to another company. ('structural subcontract works') This is where my role came in. I was required to secure prospective subcontractor(s) for CRBC that can carry out the

E construction works.

[51] We note that the defendant's director, New Chee Pheng ('DW2') had also confirmed that the plaintiff had represented to him that the plaintiff has connection with the top management of CRBC and is able to influence CRBC

F to award the subcontract to the defendant on the marked-up price. In the witness statement of DW2, Q6 reads as follows:

Q: How did you come across the IPKKL Project?

DW2: The Plaintiff told me that he is very close to the top management in

G CRBC and he can procure the IPPKL Project to the Defendant. I told him I was interested as long as the contract price are reasonable. The Plaintiff was very confident and he told me to submit my price to him. He will mark up the price and will procure the IPKKL Project to be awarded to the Defendant on his mark up price. In

H such event, he will be entitled to the difference between the Defendant price and his mark up price. I agreed to the Plaintiff proposal then ...

[52] The plaintiff's role to procure the award of the subcontract for the

I defendant is also borne out by cl 4(g) of the agreement which provides that among the obligations of the plaintiff under the agreement was to:

Assist in securing the award of the Project to the Sub-Contractor by the Contractor.

[53] After careful consideration of both learned counsels' submissions as well as the evidence adduced before the High Court, we are of the view that the learned trial judge's finding of fact that the plaintiff had represented himself as someone who was in a position to influence CRBC to award the subcontract to the defendant and the defendant had relied on such representation and executed the agreement, was amply supported by the evidence adduced. Thus, the finding that there was the existence of 'influence peddling' as consideration for the agreement should not be disturbed. We would add further, that whether in fact, the plaintiff was or was not in a position to influence the top management of CRBC is immaterial.

[54] Since the primary object of the agreement was that the plaintiff would use his influence ('influence peddling') to procure the subcontract in respect of a public interest project, we consider that the agreement is void as being in contravention of public policy, according to the principle in *Merong Mahawangsa*'s.

[55] We wish to add further that we disagree with the plaintiff's contention that since the mark up of the quotation for the subcontract was between the subcontractors and not between the main contractor and the government, there was no nexus to the government and thus do not involve tax payer's funds.

[56] The undisputed fact is that the project was a government project: 'Cadangan Pembangunan Bangunan Tambahan Bagi Ibu Pejabat Polis Kontinjen, Kuala Lumpur (IPP-KL) serta Komponennya diatas Lot PT 112, Seksyen 56, Mukim Bandar Kuala Lumpur'. It stands to reason that all subcontract works would be funded, indirectly through the main contractor(s) by public funds.

[57] The marking up of the quotation for the subcontract works would necessarily mean artificially inflating, literally by the stroke of a pen, the costs of the project. This would in effect, compromise the quality of the end products to be delivered to the government at the end of the day. The costs of maintenance of poor quality deliverables will invariably be high, thus causing a further drain of public funds. The blatant marking up of the price of the items in the revised quotations, in excess of RM4.2m, solely for the purpose of providing for the plaintiff's exorbitant 'Introducer fees' to secure the subcontract for the defendant, is to our minds, nothing short of outrageous as it is tantamount to reaping unreasonable and unlawful profits from public funds.

[58] It was held, inter alia, in *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 at p 620:

A It is contrary to Malaysian public policy that a person be hired for money or valuable consideration, to use his position and interest to procure a benefit from the government, as the sale of influence engenders corruption and undermines public confidence in the government, which is inimical to public interest.

B **[59]** In addition, illustration (j) of s 24 of the Contracts Act 1950, also describes an agreement for payment of money in order to exercise an influence as being immoral:

(j) A, who is B's advocate, promises to exercise his influence, as such, with B in favour of C, and C promises to pay RM 1,000 to A. the agreement is void because C it is immoral.

[60] Thus, we are of the considered view that the agreement between the plaintiff and the defendant contravenes both public policy and morality, D pursuant to s 24(e) of the Contracts Act 1950.

[61] His Lordship, Jeffrey Tan FCJ in *Merong Mahawangsa* had clearly enunciated the legal consequence of s 24 of the Contracts Act 1950 in the following terms:

E ... The provisions of s 24 of our Contracts Act 1950 *referred to earlier are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paras (a), (b), (c), (d) and (e) of* s 24 *shall be unlawful and the agreement which ensues shall be unlawful and void.*

F **[62]** In our view, it matters not whether the commercial transaction under curial scrutiny involves a government contract or otherwise. It must pass the test of having to clear the injuncts, as provided by s 24 of our Contracts Act 1950.

G **[63]** It is a well-established principle that the court shall not lend its aid to parties in an illegal contract by way of enforcing such a contract. In the Supreme Court case of *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281, Peh Swee Chin FCJ delivering the judgment of the Supreme Court H had enunciated the strong position taken by the courts on illegal contracts. His Lordship had stated as follows:

Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of I first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is ex facie illegal.

[64] For the reasons stated above, we are of the considered opinion that the introducer agreement between the plaintiff and the defendant is illegal

pursuant to s 24(e) of the Contracts Act 1950 and is therefore void ab initio. Accordingly, there is no question of the plaintiff's purported entitlement under the agreement.

[65] Based on the foregoing, we unanimously dismissed this appeal with costs and affirmed the decision of the High Court.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor